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Mariano Gaitan

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PROSECUTORIAL DISCRETION IN THE INVESTIGATION AND PROSECUTION OF MASSIVE HUMAN RIGHTS VIOLATIONS: LESSONS FROM THE ARGENTINE EXPERIENCE

MARIANO GAITÁN*

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I. INTRODUCTION

The international community condemns serious human rights violations such as genocide, torture, enforced disappearances, and summary executions. When these crimes are committed in a particular State, the authorities have the international obligation to seek the truth and to prosecute and punish any person who is found responsible. States cannot enact amnesty laws nor grant pardons to prevent human rigths offenders from facing justice.

But, what happens when tens of thousands of crimes are committed, for instance, in the context of armed conflicts or tyrannical regimes? In these scenarios, States face some structural obstacles that may retard or impede the investigation and prosecution of human rights abuses. First, because justice systems have limited resources, they cannot handle the extraordinary amount of cases and get overwhelmed by backlogs. Second, because these types of crimes are particularly difficult to investigate and to prove, prosecutors may not be able to collect sufficient evidence to convict all of the offenders.

Some States allow prosecutorial discretion as a tool to deal with similar difficulties in the investigation and prosecution of domestic crimes. Granting prosecutors discretion to select cases allows them to reduce workloads and to allocate resources more rationally. Moreover, prosecutors can obtain valuable evidence by offering immunity to certain offenders who cooperate with the prosecution of other criminals. Yet, it is not clear whether international law authorizes prosecutorial discretion in the investigation and prosecution of serious human rights violations.

This article examines the recent process of truth and justice in Argentina, and describes the practical difficulties that a State faces during the investigation and prosecution of massive human rights abuses. It explains why prosecutorial discretion is an useful tool to overcome these obstacles, and it addresses the question of whether international law authorizes this practice. This article supports the proposition that the international obligation to investigate and prosecute serious human rights violations should not be construed as prohibiting the exercise of prosecutorial discretion. But, at the same time, it argues that international law imposes substantive and procedural limits on prosecutors' discretionary powers. In short,

international law only allows States to exercise some limited prosecutorial discretion to advance the discharge of the duty to investigate and prosecute, provided that it is regulated by law and that victims are afforded a judicial recource to control its application in each case.

This article is divided into five sections. Section II describes the sources, scope, and rationales of the international obligation to investigate and prosecute serious human rights violations. Section III explains the structural obstacles domestic justice systems experience when trying to discharge that obligation. It describes the current process of accountability in Argentina and shows the problems that arise when a domestic system tries to investigate and prosecute mass crimes. It further explains why prosecutorial discretion is a necessary tool to overcome those structural obstacles. Section IV explains how international law regulates the exercise of prosecutorial discretion in these contexts. Finally, Section V draws the conclusion that the prohibition of prosecutorial discretion would be detrimental to the goals of the obligation to investigate and prosecute, and that a better approach is to interpret international law as regulating its exercise.

II. THE OBLIGATION TO INVESTIGATE AND PROSECUTE SERIOUS HUMAN RIGHTS VIOLATIONS

The duty to prosecute grave offences against human rights originally developed in the area of international humanitarian law, in connection with international conflicts.[1] After the horrors of World War II, the Nuremberg Trials introduced the concept of crimes against humanity, which is based on the principle that fundamental rights are inherent to the human condition, but still requires a nexus with war crimes.[2] However, the commission of massive abuses in

1. *See* ANJA SEIBERT-FOHR, PROSECUTING SERIOUS HUMAN RIGHTS VIOLATIONS 2 (2009) (asserting that as early as the 1900s, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 1906 and the Tenth Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1907 incorporated provisions punishing individual acts of ill treatment of the wounded and sick).

2. *See id.* at 3; Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2560 (1991) [hereinafter Orentlicher, *Settling Accounts*].

contexts of local conflicts and tyrannical regimes consolidated the idea that human rights violations are a matter of global concern regardless of whether they are the result of international conflicts.[3] This consensus led to the increasing development of international criminal law as a mechanism to prevent abuses and protect fundamental rights. International crimes such as genocide, crimes against humanity, war crimes, and torture are now considered jus cogens.[4] That means that, among other obligations,[5] States have the mandatory duty to prosecute or extradite perpetrators of these crimes (*aut dedere aut judicare*), and those found guilty must be punished.[6] The Rome Statute for the International Criminal Court ("ICC")[7] has codified these customary norms and has established an enforcing mechanism complementary to domestic prosecution. According to this scheme, States retain primary responsibility in the prosecution and punishment of international crimes.[8]

In addition, several human rights treaties expressly require States to investigate and prosecute genocide, torture, enforced disappearances, and other offences.[9] The Convention on the Prevention and Punishment of the Crime of Genocide,[10] adopted in 1948, was the first treaty after World War II to explicitly call for punishment of a practice considered to be the most heinous crime

3. *See* SEIBERT-FOHR, *supra* note 1, at 3.

4. M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 L. & CONTEMP. PROBS. 9, 17 (1996).

5. States also have the obligation to provide legal assistance, to eliminate statute of limitations, and to eliminate immunities including of heads of States.

6. *See* Bassiouni, *supra* note 4, at 17.

7. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute] ("A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.").

8. *See id.* ("It is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes").

9. *See* International Convention for the Protection of All Persons from Enforced Disappearances, Dec. 20, 2006, 2716 U.N.T.S. 3 [hereinafter Enforced Disappearances Convention]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention]; Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

10. Genocide Convention, *supra* note 9.

against humankind.[11] Under article I, the Contracting Parties "undertake to prevent and to punish" genocide.[12] Domestic courts of the State party in whose territory the acts of genocide have been committed have primary jurisdiction.[13] Article 12 of The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[14] also requires criminal prosecution of acts of torture,[15] which must be criminalized by States under their domestic law, as required by article 4.1. Finally, the International Convention for the Protection of All Persons from Enforced Disappearances[16] establishes a detailed catalog of criminal obligations. According to articles 4 and 7, States must criminalize enforced disappearances under their domestic criminal law, establishing appropriate penalties in proportion to the "extreme seriousness" of the crime.[17] Pursuant to this convention, all acts of enforced disappearance must be investigated and those responsible held liable. As these universal treaties show, there has been a tendency in international law to increasingly ask State Parties to prosecute and punish some particularly serious human rights offences.[18]

In conformity with this tendency, the international and regional human rights bodies have recognized the obligation to investigate and prosecute serious human rights violations, even in absence of specific treaty provisions requiring such response. The Human Rights Committee, which supervises compliance with the International Covenant on Civil and Political Rights,[19] has held repeatedly that State parties must bring perpetrators of human rights violations to justice.[20] The Committee has explicitly required

11. Orentlicher, *Settling Accounts*, *supra* note 2, at 2563-65.

12. Genocide Convention, *supra* note 9, art. 1; *see also id.* art. 2 ("Contracting Parties agree to prevent and punish acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . . .").

13. For those cases in which the States' parties failed in the investigation and prosecution of the crime of genocide, the Convention provided for the creation of an international penal tribunal.

14. Torture Convention, *supra* note 9.

15. *See id.* art. 12; *see also id.* art. 1 (providing a detailed definition of what actions are considered "torture").

16. Enforced Disappearances Convention, *supra* note 9.

17. *See id.* arts. 4, 7; *see also id.* art. 2 (defining "enforced disappearance").

18. *See* SEIBERT-FOHR, *supra* note 1, at 183.

19. ICCPR, *supra* note 9.

20. *See, e.g.*, Barbato v. Uruguay, Communication No. 84/1981, Hum. Rts.

punishment for specific offences against fundamental rights, such as arbitrary execution and torture.[21] According to the authoritative interpretation of the Committee, the duty to investigate, prosecute, and punish is inherent to the general obligation to "respect and ensure" the rights recognized in the Covenant, established in article 2.1. Similarly, the Inter-American Court on Human Rights has derived the specific obligation to investigate, prosecute, and punish from the general obligation to "respect and ensure" the free and full exercise of fundamental rights, established in article 1.1 of the American Convention of Human Rights.[22] In the landmark *Velasquez Rodríquez Case*,[23] the Court held that "[a]s a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention."[24]

The scope of the duty to investigate and prosecute, while not completely clear, encompasses at least the core international crimes of genocide, crimes against humanity, war crimes, torture, and other grave offences against fundamental rights, such as extrajudicial executions and arbitrary detentions. Those responsible for these abuses as authors, instigators, or accomplices must be identified, tried and punished.

States may not enact amnesty laws nor grant pardons to avoid compliance with their obligation to investigate gross human rights violations and to hold perpetrators accountable.[25] There is consensus among the international community that serious violations of human rights that constitute international crimes of jus cogens cannot be subject to amnesties, because the obligation to prosecute is inherent

Comm., 124, para. 11, U.N. Doc. A/38/40, U.N. GAOR, Suppl. No. 40 (1983); ICCPR General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Art. 2), Hum. Rts. Comm., ¶ 18, U.N. Doc. CCPR/C/21/Rev. 1/Add.13 (May 26, 2004).

21. General Comment No. 6: The Right to Life (Art. 6), Hum. Rts Comm., 6, ¶ 3, U.N. Doc. HRI/GEN/1/Rev.1 (July 27, 1982); General Comment No. 20: Replaces General Comment No. 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7), Hum. Rts. Comm., 32, ¶ 13, U.N. Doc. HRI/GEN/1/Rev. 1 (Apr. 3, 1992).

22. American Convention on Human Rights art. 1, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

23. Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (July 29, 1988).

24. *Id.*

25. *See generally* OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS, RULE OF LAW TOOLS FOR POST CONFLICT STATES, U.N. Sales No. E.09.XIV.1 (2009).

to this category.[26] International human rights bodies have made clear that amnesty laws are not allowed even for the purposes of pacification or reconciliation during democratic transitions. The Committee on Human Rights has rejected the argument that amnesties are necessary to ensure human rights after authoritarian regimes. To the contrary, amnesties contribute to an atmosphere of impunity, which may encourage further abuses.[27] The Inter-American Commission of Human Rights has held that amnesty laws violate numerous provisions of the Convention because they are contrary to the duty to ensure human rights and to the victim's rights to justice and to truth.[28] Likewise, the Inter-American Court of Human Rights in *Barrios Altos v. Peru*[29] expressly declared that amnesty laws intended to prevent the prosecution and punishment of violations of fundamental rights are inadmissible.[30]

The main rationale of the obligation to investigate and prosecute serious human rights violations is deterrence.[31] Since impunity encourages further violations of human rights, prosecution and punishment of offenders is regarded as a necessary measure to prevent future abuses. The deterrence foundation is implied in the jurisprudence of international human rights bodies, which have identified the obligation to investigate and prosecute as an inherent

26. *See, e.g.*, Bassiouni, *supra* note 4, at 21.

27. *See* Concluding Observations of the Human Rights Committee, Chile, ¶ 7, Hum. Rts. Comm., U.N. Doc. CCPR/C/79/Add.104 (1999); Preliminary Observations of the Human Rights Committee, Peru, ¶ 9, Hum. Rts. Comm., U.N. Doc. CCPR/C/79/Add. 67 (July 25, 1996); Rodriguez v. Uruguay, Commc'n. No. 322/1988, ¶ 12.4, Hum. Rts. Comm., U.N. Doc. CCPR/C/51/D/322/1988 (1994).

28. *See* Inter-Am. Comm'n H.R., Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II/.106, doc. 59 rev. ¶ 221 (2000); Parada Cea v. El Salvador, Case 10.480, Inter-Am. Comm'n H.R., Report No. 1/99, OEA/Ser.L/V/II.95 doc. 7 rev. ¶ 107 (1999).

29. Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001).

30. The Court expressly declared that:

> [A]ll amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.

Barrios Altos, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41.

31. Orentlicher, *Settling Accounts*, *supra* note 2, at 2600-01.

aspect of the duty to "respect and ensure" human rights.[32] Further, this rationale has been explicitly announced in several international treaties. For instance, the Preamble of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity states that "the effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms."[33] More recently, the Rome Statute expressed the determination of the international community "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[34]

In addition to the deterrence rationale, the organs of the Inter-American human rights system have developed an independent justification grounded on the victims' rights.[35] This rationale regards the investigation, prosecution, and punishment of offenders as a remedy in the individual interest of victims, who are entitled to a "right to justice." The Inter-American Court of Human Rights has derived this right from the provisions granting a right to a fair trial and to judicial protection.[36] In the *Durand and Ugarte Case*,[37] the Court held that:

> Article 8(1) of the American Convention, in connection with Article 25(1) thereof, confers to victims' relatives the right to investigate their disappearance and death by State authorities, to carry out a process against the liable parties of unlawful acts, to impose the corresponding sanctions, and to compensate damages suffered by their relatives.[38]

Thus, States must prosecute and punish serious human rights violations not just to prevent further abuses, but to provide justice and closure to the victims of the crimes already perpetrated. Although this independent rationale has been expressly recognized only in the Inter-American context, it seems to be gaining increasing

32. *See id.*
33. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Dec. 16, 1968, 754 U.N.T.S. 73.
34. *See* Rome Statute, *supra* note 7.
35. SEIBERT-FOHR, *supra* note 1, at 281-82.
36. American Convention, *supra* note 22, art. 8(1), 25(1).
37. Inter-Am. Ct. H.R. (ser. C) No. 68 (Aug. 16, 2000).
38. *Id.* ¶ 130.

acceptance in the international community.[39]

In sum, the obligation to investigate and prosecute serious human rights violations is well established by international customary law, several specific human rights conventions, and the authoritative interpretation of universal and regional human rights treaties. This obligation has a broad scope and amnesty laws for these crimes have been expressly repudiated. The two underlying justifications of this duty are deterrence of further violations of human rights and the victim's right to justice.

III. THE NEED FOR PROSECUTORIAL DISCRETION

A. STRUCTURAL OBSTACLES FOR THE INVESTIGATION AND PROSECUTION OF MASSIVE HUMAN RIGHTS ABUSES

The fulfillment of the obligation to investigate and prosecute serious human rights violations poses a daunting challenge for States. After armed conflicts or dictatorial regimes, political concerns may discourage new governments from pursuing truth and justice.[40] Those responsible for the abuses may retain power to facilitate the transition and obstruct any attempt to investigate past atrocities.[41] But even when political stability is guaranteed and the authorities are willing to abide by the international obligation to investigate and prosecute, structural limits of domestic justice systems may impede the proper discharge of that duty.[42] The special characteristics of

39. *See* SEIBERT-FOHR, *supra* note 1, at 22-3 (discussing the Human Rights Committee's shifting trend from viewing punishment as a means of prevention or deterrence to viewing punishment as a remedy). It is also indicative of this trend the fact that *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by G.A. res. 60/147, Dec. 6 2005, expressly states that "[i]n cases of gross violations . . . constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible . . . and, if found guilty, the duty to punish . . . .").

40. Orentlicher, *Settling Accounts*, *supra* note 2, at 2596-98 (illustrating that in Argentina, newly elected President Raul Alfonsin tried to abate protracted prosecution against lower-level military personnel for fear of risking a military uprising).

41. *See*, *e.g.*, *id.*; CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL 77 (1996).

42. *See* Orentlicher, *Settling Accounts*, *supra* note 2, at 2596.

human rights abuses raise considerable practical obstacles for its investigation and prosecution.

Serious human rights violations often imply the commission of myriad of crimes, many more than what domestic justice systems can process.[43] Large-scale abuses perpetrated during relatively prolonged armed conflicts or tyrannical regimes may victimize thousands or even millions of individuals.[44] These crimes are necessarily committed by large numbers of individuals, who are members of State agencies or similarly organized groups.[45] Even well-resourced systems may be overwhelmed by the extraordinary amount of cases generated in these circumstances.[46]

Moreover, the crimes committed in these contexts are particularly complex and difficult to prove, which make their investigation even more costly and time-consuming.[47] For instance, proving the elements of a crime against humanity is burdensome since this crime requires showing that the particular act charged, e.g. a murder, was committed in the context of a systematic and generalized attack against the civil population.[48] Likewise, the prosecution of high-level offenders requires proving complex structures of command to connect the defendant with the specific act.[49]

Additional obstacles arise from practical difficulties in collecting evidence of these crimes. Serious violations of human rights are usually committed clandestinely and offenders make deliberate efforts to conceal their participation and to eliminate incriminating

43. *See id.* at 2599-2600.

44. *See* Bassiouni, *supra* note 4, at 10 n.6 (providing figures of estimated deaths in "situations producing a high level of victimization . . . including genocide, crimes against humanity, and war crimes for which there has been no accountability").

45. *See* Bassiouni, *supra* note 4, at 1; *see, e.g.*, NINO, *supra* note 41, at 10-14 (describing the hundreds of thousands of trials that took place across Europe in the aftermath of World War II, indicting and trying persons who had allied with the Nazis).

46. *See* Orentlicher, *Settling Accounts*, *supra* note 2, at 2596 (suggesting that even highly functioning judicial systems such as the criminal justice system in the United States could have difficulty prosecuting as many cases as Argentina was expected to process after the "dirty war").

47. NANCY A. COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE APPROACH 41 (2007).

48. *Id.*

49. *Id.*

evidence.[50] The archetypical example of this practice is the crime of enforced disappearance. By definition, this crime implies the suppression of any evidence, including the very person of the victim, and the subsequent refusal to provide information about his or her fate.[51] Other crimes, like acts of torture committed behind the walls of military facilities, or summary executions in a remote rural community, are equally difficult to prove.[52] Most of the time, the prosecution is unable to find witnesses of these crimes and on the rare occasions where witnesses are available, they may provide little information.[53] In these situations, offenders are usually the only ones who know the facts and possess the necessary evidence to carry out the prosecutions.[54]

All of these structural constraints are accentuated at the outset of transitions from armed conflicts or tyrannical regimes when the judiciary is weak and often corrupted.[55] Rebuilding justice systems takes time, and when they are working at maximum capacity, the investigations are usually more difficult because of the loss of evidence. Finally, the normative and ethical imperative to conduct human rights prosecutions with the same guarantees afforded to any criminal defendant considerably increases costs and the pressure on the judicial system.[56]

B. THE ARGENTINE CASE: AN HISTORICAL EXAMPLE OF THE STRUCTURAL OBSTACLES

In the past decade, Argentina has been carrying on a large scale

50. Diane F. Orentlicher, *Bearing Witness: The Art and Science of Human Rights Fact-Finding*, 3 HARV. HUM. RTS. J. 83, 131-32 (1990) [hereinafter Orentlicher, *Bearing Witness*].

51. Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 451, 454 (1990).

52. *See* Orentlicher, *Bearing Witness*, *supra* note 50, at 94-95.

53. *See id.*

54. *See id.*

55. *See* Roht-Arriaza, *supra* note 51, at 510-11 (observing that new governmets are fragile and easily deterred from prosecuting human rights violations because of the likelihood of political unrest or military uprising).

56. Nancy Amoury Combs, *Plea Bargains in International Criminal Prosecutions*, in 3 INTERNATIONAL CRIMINAL LAW 516, 562 (M. Cherif Bassiouni ed., 3d ed. 2008) [hereinafter *Plea Bargains*].

process of investigation and prosecution of past abuses.[57] This experience demonstrates the problems that arise when a domestic system of criminal prosecution is required to investigate and prosecute all crimes committed in a context of massive violations of human rights.[58]

During the 1976-1983 military dictatorship, the "Military Juntas" established a systematic plan to kidnap political dissidents, torture them in clandestine detention camps, and finally disappeared them.[59] According to official records, approximately 10,000 people were victims of these crimes; but human rights groups claim that the number of victims rises as high as 30,000.[60]

Democratically elected President Raúl Alfonsín pushed forward a comprehensive transition program, which included the investigation of the atrocities committed during the dictatorship and the criminal prosecution of a few high-ranked officers.[61] In 1985, a civil court convicted five members of the "Military Juntas" in a historic trial regarded worldwide as a successful experience of transitional justice.[62] However, two military insurrections obliged the Argentine Congress to pass the "Full Stop Law" and the "Due Obedience Law," two amnesty laws that foreclosed the prosecution of human rights violations.[63] In 1989 and 1990, President Carlos Menem granted

57. *See Background: Thirty Thousand Gone, but "Never Again"*, INT'L CTR. FOR TRANSITIONAL JUST., https://www.ictj.org/our-work/regions-and-countries/argentina (last visited Oct. 24, 2015).

58. Orentlicher, *Settling Accounts*, *supra* note 2, at 2560.

59. *Nunca Mas (Never Again)*, NAT'L COMM'N ON THE DISAPPEARNCE OF PERSONS (1984), http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_000.htm.

60. *See* Uki Goni, *Blaming the victims: dictatorship denialism is on the rise in Argentina*, GUARDIAN, Aug. 29, 2016, https://www.theguardian.com/world/2016/aug/29/argentina-denial-dirty-war-genocide-mauricio-macri.

61. *See See* NINO, *supra* note 41, at 67, 69 (describing President Alfonsiden comprehensive plan to first, search for the disappeared persons; then to punish perpetrators of the disappearances by reforming the legal system; and then to prevent the disappearances from happening again by ratifying international human rights treaties and creating stronger human rights protection mechanisms).

62. Cámara Nacional de Casación Penal [C.N.C.P.] [National Court of Appeals on Criminal Matters] 9/12/1985, "Juicio a las Juntas Militares" ["Judgment of the Military Juntas"], 13/84 (Arg.), http://www.internationalcrimes database.org/Case/1118#p3.

63. *See* Law No. 23.492, Dec. 24, 1986 (Arg.); *see also* Law No. 23.521, Jun. 8, 1987 (Arg.).

pardons to those military officers convicted during the past administration and to several others who were still under prosecution, with the alleged purpose of favoring "national reconciliation."[64] The government position toward the past radically changed during the Néstor Kirchner administration.[65] In 2003, Congress passed an act declaring that the "Full Stop" and "Due Obedience" laws were null and void.[66] In 2005, the Supreme Court declared that amnesty laws were unconstitutional in the *Simón Case*;[67] and in 2007 it declared the same with respect to pardons in the *Mazzeo Case*. In this way, after almost twenty years of impunity, all legal barriers that prevented the investigation and prosecution of the crimes committed during the military regime were removed and hundreds of cases were reopened all around the country.

Victims of the dictatorship and human rights groups played a key role in the configuration of the current process of accountability in Argentina. They constantly opposed the government's measures that tended to foreclose criminal prosecution and developed a complex political and legal strategy to bring about truth and justice.[68] Before the nullification of amnesty laws, this strategy included "truth trials," criminal trials in other countries, and public demonstrations.[69] After official investigations and prosecutions restarted, many victims and human rights organizations acted as private prosecutors in the

64. *See* Daniel W. Schwartz, *Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the 'Dirty War' in International Law*, 18 EMORY INT'L L. REV. 317, 333-34 (2004).

65. *Argentine Mothers Rejoice at Repeal of Amnesty Laws*, CHI. TRIB. (Aug. 22, 2003), http://articles.chicagotribune.com/2003-08-22/news/0308220288_1_human-rights-amnesty-laws-military-officers.

66. Act 25.779 entitled "Declaration of Nullity of the Due Obedience and the Full Stop Laws", published on the Argentine books (Boletin Oficial de la República Argentina) on 9/3/2003.

67. *See* Gaspar Forteza, *Regarding Simón y Otros: Accountability in Argentina and International Human Rights as Domestic Positive Law*, 3 FIU L. REV. 187, 188 (2007).

68. *Id.* at 196.

69. After amnesty laws were passed precluding criminal proceedings against perpetrators of past human rights crimes, victims' families sought "truth trials" in courts where the courts sought information about what had happened to the the disappeared. *See* Kathryn Sikkink, *From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights*, 50 LATIN AM. POL. & SOC'Y 1, 1, 11-13 (2008) (lauding the Argentine use of innovative techniques and methods to bring perpetrators of the disappearances to justice).

criminal cases, as allowed by Argentine procedural law.[70] Most victims and organizations claimed that every crime should be investigated and that all of those responsible should be prosecuted and punished.[71]

Moreover, Argentine procedural criminal law prohibits the exercise of prosecutorial discretion.[72] Unlike the U.S. system, the Argentine system is based on the European inquisitorial model and is governed by the principle of mandatory prosecution.[73] This principle requires prosecutors to promote the investigation and prosecution of every infraction to criminal law that comes to their knowledge.[74] They cannot forego prosecution based on economic, political, or practical criteria.[75] These legal constraints forced prosecutors to go after all of the offenders for all of the crimes committed during the dictatorship against tens of thousands of victims.[76]

During the past decade, around 500 individuals have been convicted on counts of crimes against humanity, and more than 1,000

70. Verónica Michel & Kathryn Sikkink, *Human Rights Prosecutions and the Participation of Victims in Latin America*, 47 L. & SOC'Y REV. 873, 886-89, 891 (2013) (asserting that after the amnesty laws were passed to prevent further litigation against military junta members, victims and human rights organizations used every method they could, including private prosecution, to keep cases open; on average private prosecutors kept cases open for six years longer than state prosecutors, thereby leading to several high profile sentencings including the detentions of ex-president Rafael Videla and Admiral Emilio Massera).

71. *See* NINO, *supra* note 41, at 112 (stating that "[t]he human rights groups' stance toward retroactive justice was intransigently retributive. They sought to punish each and every person responsible for the abuses, regardless of their degree of involvement."); *see also* Claudio Tamburrini, *Trading Truth for Justice?*, 10 RES PUBLICA 153 (Special Issue) (2010). For a more recent exposition of the retributive position, see Christopher K. Hall, *The Danger of Selective Justice: All Cases Involving Crimes under International Law Should be Investigated and the Suspects, when there is Sufficient Admissible Evidence, Prosecuted*, *in* CRITERIA FOR PRIORITIZING AND SELECTING CORE INTERNATIONAL CRIMES CASES 171 (Morten Bergsmo ed., 2d ed. 2010).

72. *See* ALEJANDRO CARRIO, CRIMINAL JUSTICE IN ARGENTINA: AN OVERVIEW FOR AMERICAN READERS 4, 7-11 (1989).

73. *See id.*

74. Andrew S. Brown, *Adiós Amnesty: Prosecutorial Discretion and Military Trials in Argentina*, 37 TEX. INT'L L.J. 203, 218 (2002).

75. *See id.* (stating that prosecutors in Argentina are required to bring a case if all of the elements of the crime are satisfied).

76. *See id.*

have been indicted.[77] However, despite the great advances made, the Argentine system of criminal prosecution has faced dramatic difficulties in proceeding in such an extraordinary number of cases.[78] Moreover the absolute prohibition of prosecutorial discretion has increased the problem. Some adverse consequences of the attempt to investigate and prosecute every crime include:

(1) Excessive duration of the investigations: The investigations of these crimes restarted exactly one decade ago, but they remain far from finished. Instead, the number of defendants indicted and victims identified continues to increase every year.[79] Because of the slow pace of the investigations, many defendants have died before trial.

(2) Excessive length of the trials: Trials against several defendants for many crimes are excessively lengthy and costly. For instance, a trial for crimes committed at the "ESMA"[80] involving eighteen defendants and eighty-six victims lasted twenty-two months. According to a report prepared by the prosecutor's office, a further trial involving sixty-five defendants and 793 victims would last five years.[81] Such a lengthy trial not only entails high financial costs, but also a high risk that defendants die before a verdict can be pronounced.

(3) De facto selection of cases: Faced with an inevitable shortage

77. PROCURADURÍA DE CRIMENES CONTRA LA HUMANIDAD DEL MINISTERIO PUBLICO FISCAL DE LA REPUBLICA ARGENTINA [CRIMES AGAINST HUMANITY UNIT OF THE ARGENTINE GENERAL ATTORNEY'S OFFICE], INFORME SOBRE EL ESTADO DE LAS CAUSAS POR VIOLACIONES A LOS DERECHOS HUMANOS COMETIDAS DURANTE EL TERRORISMO DE ESTADO [REPORT ON THE CAUSES OF HUMAN RIGHTS VIOLATIONS COMMITTED DURING THE MILITARY DICTATORSHIP*]* 1, 2 (2013) [hereinafter *Report on Causes of Human Rights Violations*].

78. *See* Mirna Goransky & Maria Luisa Pique, *(The Lack of) Criteria for the Selection of Crimes Against Humanity Cases: The Case of Argentina*, *in* CRITERIA FOR PRIORITIZING AND SELECTING CORE INTERNATIONAL CRIMES CASES 91, 104 (Morten Bergsmo ed., 2d ed., 2010) (outlining the various difficulties in the prosecution of the Argentine military junta including inefficiencies relating to a lack of prosecutorial discretion).

79. *Report on Causes of Human Rights Violations*, *supra* note 77, at 2.

80. The "ESMA" (School of Mechanics of the Argentine Navy) was one of the biggest clandestine centers of detention during the military dictatorship. *See* Goransky & Pique, *supra* note 78, at 102 (describing the alleged crimes committed at ESMA).

81. Juzgado Federal 22 [Juzg. Fed.] [lower federal courts], Buenos Aires, 30/12/2011, "*ESMA" Case*, Prosecutor's Brief, unpublished.

of resources to investigate and prosecute all of the cases, prosecutors and courts are forced to prioritize, even when such practice is formally prohibited. The problem with de facto selection of cases is the risk of application of illegitimate criteria, and the lack of accountability for the decision not to prosecute certain cases.[82] Most prosecutors and courts focus on the easiest cases (those more documented) and disregard hard cases, in which more complex investigations are required.[83] For instance, in the investigation of the crimes committed in the military barracks of *Campo de Mayo* the court and the prosecutor focused on high ranking officials and did not proceed with the prosecution of other offenders.[84] As a consequence, the commander of that unit was tried and convicted six times for several counts of crimes against humanity,[85] while other individuals who directly executed acts of torture or murder have not even been indicted yet.

(4) Irrational allocation of resources: The requirement that every crime be brought to justice led to an irrational allocation of resources. Many offenders continue to be prosecuted regardless of whether it was necessary to deter further abuses or satisfy the victim's rights.[86] For example, in 2010 former Dictator Jorge Videla was indicted for 571 counts of crimes against humanity, although he had already been convicted and sentenced to life imprisonment, which was the maximum sentence.[87]

(5) Incapability of solving complex cases: The crimes prosecuted until now are mainly those that were documented during the 1980s

82. Goransky & Pique, *supra* note 78, at 91.

83. *See id.* at 101 (listing the reasons Prosecutors chose to pursue certain cases in Argentina).

84. PROCURADURIA DE CRIMENES CONTRA LA HUMANIDAD DEL MINISTERIO PUBLICO FISCAL DE LA REPUBLICA ARGENTINA [CRIMES AGAINST HUMANITY UNIT OF THE ARGENTINE GENERAL ATTORNEY'S OFFICE], LISTADO DE CONDENADOS A JUNIO 2014 [LIST OF CONVICTIONS TO JUNE 2014] 1 (2014), http://www.fiscales.gob.ar/lesa-humanidad/wp-content/uploads/sites/4/2014/06/Lista-de-condenados-a-junio-de-2014.pdf.

85. *Id*. at 5.

86. *See* Goransky & Pique, *supra* note 78, at 104 (describing the potential detriment to witnesses, due process protections, and judicial efficiency caused by the selection of cases in Argentina).

87. Juzgado Federal [Juzg. Fed.] [lower federal courts], 25/9/2008, "Primer Cuerpo de Ejercito," Indictment, La Ley [L.L.] (2008) (Arg.).

by CONADEP,[88] the Argentine Truth Commission. Because of the lack of witnesses and other evidence, the system is virtually incapable of identifying most of the offenders who acted clandestinely. As a consequence, an undetermined but presumably high number of offenders remain unpunished.[89]

(6) Surreptitious granting of immunity to defendants who appear as witnesses at trials: Pressed for the need for insider evidence, several prosecutors and courts have admitted the testimony of individuals implicated in the commission of the crimes as if they were mere witnesses.[90] For example, in the case for the crimes committed at *Campo de Mayo*, a sergeant called Victor Ibáñez testified as a key witness for the prosecution against other offenders, despite his proven collaboration in the commission of the crimes.[91] This shows that the granting of immunity for cooperation is simply inevitable in some circumstances, even when it is formally prohibited.[92] Regulating this practice by keeping prosecutors accountable before victims and society is more preferable than tolerating its exercise outside the law.[93]

88. The CONADEP (Comision Nacional sobre la Desaparicionde Personas) [National Commission on the Disappearance of People] was created by President Alfonsrs as an essential part of his program of democratic transition. The CONADEP produced the report *Nunca Mas* (*Never Again*), NAT'L COMM'N ON THE DISAPPEARNCE OF PERSONS (1984), http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_000.htm.

89. Brown, *supra* note 74, at 219.

90. *See* Alex Obote-Odora, *Case Selection and Prioritization Criteria at the International Criminal Tribunal for Rwanda*, *in* CRITERIA FOR PRIORITIZING AND SELECTING CORE INTERNATIONAL CRIMES CASES 45, 53 (Morten Bergsmo ed., 2d ed. 2010) (stating the general proposition that witnesses who are also perpetrated should be tried as well).

91. The defense attorney objected to this testimony arguing that the witness "served in the logistics sector at Campo de Mayo, which means that he is related to the events investigated even if he has not been formally charged" [translation by the author]. This objection was rejected by the Court. *See* Camara Nacional de Casacion [CNCP] [National Court of Appeal on Criminal Matters: highest federal court on criminal matters], 7/12/2012, "Riveros, Santiago Omar y otros s/recursos de casacion," Registro [Register] No. 20905 (Arg.) [hereinafter CNCP Case].

92. Indeed this practice constitutes a criminal offence under Argentinean law. *See* CÓDIGO PENAL [CÓD. PEN] [CRIMINAL CODE] art. 274 (1984) (Arg.).

93. Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 731 (2006).

C. PROSECUTORIAL DISCRETION AS A NECESSARY TOOL TO OVERCOME STRUCTURAL OBSTACLES

Granting prosecutors some discretion is a legal mechanism to overcome structural obstacles for the investigation and prosecution of massive crimes. Prosecutorial discretion allows for a selection of cases in order to reduce workloads and optimize the allocation of resources.[94] This power allows prosecutors to choose to forego punishment in certain cases with the purpose of saving financial and human resources to investigate other cases considered more important.[95] Further, prosecutors can also use their discretion to obtain evidence of certain complex crimes. They can offer immunity or lenient treatment to persons implicated in the commission of crimes in exchange for their collaboration in the investigation and testimony at trial as "crown witnesses."[96]

The case of the United States powerfully illustrates the use of prosecutorial discretion with these aims. American prosecutors, both on the federal and the state level, exercise considerable discretion in deciding whether or not to prosecute a case.[97] One of the most common explanations of this practice is the limitations in available enforcement resources.[98] Prosecutors also use their discretionary powers to induce offenders to cooperate with the prosecution of other persons, acting as informants in the investigatory stage and as witnesses at trial, in exchange for immunity.[99] Alternatively, as part of plea bargain negotiations, prosecutors may sign "cooperation agreements" reducing the sentences of offenders who agree to

94. *See* JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS: CRIMINAL PROCEDURE, 13 (Hiram E. Chodosh ed. 2009) (stating that case selection allows states to conserve limited resources so that they may be used for cases that require such resources).

95. *Id.*

96. *See* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL, 158 (2003) (explaining that the concept of "crown witness" appeared in England in the 17th century).

97. *See* 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 13.2(a) (3d ed. 2014) (overviewing the precedent and practice of prosecutorial discretion in the United States).

98. *Id.* ("No prosecutor has sufficient resources available to prosecute all of the offenses which come to his attention. [Thus] the prosecutor must remain free to exercise his judgment in determining what prosecutions will best serve the public interest.").

99. *Id.*

collaborate.[100] These practices are considered indispensable tools in the investigation and prosecution of complex crimes.[101]

Prosecutorial discretion has also been increasingly applied at international criminal tribunals. Despite the initial reluctance to apply discretion in relation to core international crimes, the international tribunals have finally accepted it as an inevitable consequence of limited material resources and the difficulty to obtain evidence.[102] The case of the International Criminal Tribunal for the Former Yugoslavia ("ICTY")[103] is particularly demonstrative of this process. Originally, the ICTY's rules did not contemplate the exercise of prosecutorial discretion to obtain information from defendants in exchange for immunity.[104] A proposal made by the United States to include a provision expressly authorizing such practice was rejected.[105] The ICTY's then president, Antonio Cassese, explained that:

> persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution, and other inhuman acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be.[106]

However, this emphatic rejection of prosecutorial discretion gave way to pressure from the international community to reduce the costs of the proceedings and to the need for the insider testimony of defendants.[107] After the adoption of completion strategies in 2003, ITCY prosecutors engaged in aggressive plea bargaining, and even withdrew charges of genocide and crimes against humanity to obtain not only guilty-pleas, but also evidence against other defendants.[108] By September 2006, forty-eight defendants had been prosecuted,

100. TURNER, *supra* note 94, at 30, 31.

101. Jenia I. Turner reports that "prosecutors point out that, without the cooperation of insiders, it would be very difficult, if not impossible, to bring down large-scale or sophisticated conspiracies." *Id.* at 34.

102. *Plea Bargains*, *supra* note 56, at 562.

103. S.C. Res. 827 (May 25, 1993).

104. *Plea Bargains*, *supra* note 56, at 561.

105. *Id.* (explaining that the gravity of the crimes at issue and the peace and security mission of the court appeared at odds with the process of plea bargaining).

106. *Id.*

107. *Id.*

108. *Id.*

nineteen of whom pleaded guilty and six testified as witnesses for the prosecution.[109]

IV. INTERNATIONAL LAW ALLOWS PROSECUTORIAL DISCRETION BUT IMPOSES SUBSTANTIVE AND PROCEDURAL LIMITS

A. CONSTRUING THE OBLIGATION TO INVESTIGATE AND PROSECUTE AS ALLOWING PROSECUTORIAL DISCRETION

The question of whether international law allows prosecutorial discretion in the investigation and prosecution of serious human rights violations has not been squarely addressed by international human rights bodies and scholars.[110] Scholarly works have mainly focused on the limits to this obligation derived from political concerns, and particularly on the question of whether amnesty laws are admissible under international law.[111] It is not surprising that amnesty issues have taken central stage; most States have granted amnesties for the atrocities committed in the past decades all around the world.[112] However, recent pronouncements of internationals human rights bodies have emphatically rejected amnesties laws, making it necessary to consider whether there are other tools to handle the influx of cases. In particular, whether States may use prosecutorial discretion to overcome practical obstacles derived from structural limitations of domestic justice systems.

General principles of construction of international obligations lead to the conclusion that international law does not ban the exercise of prosecutorial discretion in the investigation and prosecution of massive human rights abuses. Although some decisions of international human rights bodies suggest that States are required to investigate every serious offense,[113] this obligation should not be

109. *Id.*

110. Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 175 (2003).

111. Orentlicher, *Settling Accounts*, *supra* note 2, at 2540; Roht-Arriaza, *supra* note 51, at 453.

112. Slye, *supra* note 110, at 175 (describing examples of states granting amnesties).

113. *See, e.g.*, Rodriguez v. Uruguay, *supra* note 27, at 33 (stating that "[t]he

construed as imposing an impracticable task on prosecutors and the judiciary.[114] As the Argentine case demonstrates, even if a State is genuinely willing to abide by international law, its domestic criminal systems may simply lack the operative capacity to investigate and prosecute every single offense when tens of thousands of crimes have been committed by thousands of offenders.[115] No domestic justice system, even one of a developed country, has the operative capacity to prosecute all of the crimes committed in its jurisdiction. And, as discussed above, the investigation and prosecution of crimes committed in contexts of widespread violations of human rights are even more costly and time-consuming.

Construing the international duty to investigate and prosecute as requireing States to go after those responsible for every single crime would be not only unrealistic, but also detrimental to the goals of the obligation itself. Indeed, an absolute prohibition on prosecutorial discretion would deprive States of a necessary tool to remove the structural obstacles that impede the fulfilment of that obligation, since prosecutorial discretion is an effective means to control the workloads and to obtain valuable evidence and eyewitness accounts. Providing prosecutors with some discretionary powers enhances their ability to investigate and prosecute more cases and improves the levels of accountability and deterrence. Therefore, prosecutorial discretion is plainly consistent with the idea of preventing further violations of human rights.

It may be contended that the exercise of discretion in a particular case may infringe on the victim's rights.[116] However, admitting so is not to say that this practice is incompatible with international law. The victims' rights to truths and justice, as fundamental rights, are not absolute and can be subject to reasonable limitations under

State is obligated to investigate every situation involving a violation of the rights protected by the Convention.").

114. Orentlicher, *Settling Accounts*, *supra* note 2, at 2600 ("pursuant to general canons of construction, the comprehensive treaties should be interpreted in a manner that avoids imposing impossible obligations or duties whose discharge would prove harmful.").

115. *See* Goransky & Pique, *supra* note 78, at 105 (describing the problems caused by a lack of capacity in the Argentine judicial system).

116. *See* Brown, *supra* note 74, at 222 (explaining that the gravity of the crime may make the exercise of discretion morally complicated).

certain circumstances.[117] Limitations on these rights are justified when they are necessary to guarantee the rights of other victims and the general interest of society in knowing the truth and preventing further violations of human rights.[118] Prosecutorial discretion is allowed to the extent that it allows a more comprehensive truth telling and a more efficient prosecution of those responsible for the crimes, ensuring that a larger number of victims have their rights to truth and justice guaranteed.[119]

B. INTERNATIONAL LAW IMPOSES LIMITS TO PROSECUTORIAL DISCRETION

As just explained, the international obligation to investigate and prosecute should not be interpreted as prohibiting prosecutorial discretion in the context of gross violations of human rights. That is not to say, however, that every exercise of discretion is admissible. On the contrary, international law establishes strict conditions and places substantial constraints on this practice.[120] Substantive and procedural limits may be derived from the scope of the obligation to investigate and prosecute, its underlying rationales, and general principles of international human rights law. These limits will be examined in turn.

1. Substantive Limits

Prosecutorial discretion may only be used as a tool to overcome actual obstacles in the functioning of the justice system that impede the fulfillment of the obligation to investigate and prosecute. This limit is a necessary consequence of the broad scope of the international duty. States have an obligation to investigate, prosecute, and punish those found guilty of serious violations of human rights and they must make a good faith effort to discharge that obligation to

117. Frédéric Mégret, *Nature of Obligations*, *in* INTERNATIONAL HUMAN RIGHTS LAW 124, 141 (Daniel Moeckli et al. eds., 2010).

118. *Id.*

119. *See id.* (explaining that international law allows for limitations on the exercise of human rights when it is in the interest of promoting other's rights).

120. Bassiouni, *supra* note 4, at 21 (arguing that "national prosecutions [of international crimes] should include all persons who have committed criminal acts, subject however to reasonable and justified prosecutorial discretion.").

the maximum of their possibilities.[121] States must "organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[122] Thus, they cannot allege their own inaction as a legitimate obstacle to comply with the obligation to investigate and prosecute. Prosecutorial discretion may be used only to overcome structural obstacles derived from the special characteristics of serious human rights violations, namely the backlogs produced by a massive number of cases and the difficulty of collecting evidence.

In this aspect, lawful use of prosecutorial discretion is distinguishable from other outlawed measures whose main objective is to provide impunity, such as amnesties or pardons. As explained above, States may not adopt amnesties to prevent the investigation and prosecution of core international crimes and other grave offenses against fundamental rights. Accordingly, States may not circumvent this prohibition by applying prosecutorial discretion. Similarly, States may not use prosecutorial discretion to shield a defendant from criminal prosecution at international level. A decision to grant immunity to a defendant designed to prevent that person from being held accountable and without any useful purpose for the investigation and prosecution of other crimes would be contrary to international law. In these situations, the Rome Statute allows the Court to exercise its complementary jurisdiction.[123]

The basic standard to determine whether a State has applied discretion within these bounds is straightforward: Where the result of prosecutorial discretion, in the general balance, is a more complete investigation of the crimes and a more effective prosecution of those responsible, the State has properly exercised that power.[124] Conversely, where the result is greater impunity than what would

121. Orentlicher, *Settling Accounts*, *supra* note 2, at 2551 (stating the general proposition that international law requires the investigation, prosecution, and punishment of those who commit serious human rights abuses).

122. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

123. Rodriguez v. Uruguay, *supra* note 27, at 31.

124. Rome Statute, *supra* note 7, arts. 17(1)(b), 17(2)(a) ("the proceedings [at the domestic level] were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.").

have otherwise existed, the State has applied prosecutorial discretion beyond its limits and has failed in the fulfillment of the international duty to investigate and prosecute.[125]

Determining whether prosecutorial discretion has been applied in a manner compatible with international law in a particular case is more complex. Prosecutorial discretion may be exercised in relation with (a) perpetrators, (b) victims, and/or (c) charges. Consider these examples: (a) a prosecutor may refrain from prosecuting a certain defendant in exchange for his or her cooperation in the prosecution of other individuals; or (b) she may decide not to prosecute the crimes committed against certain victims in order to reduce the workloads; or (c), instead of prosecuting a defendant for all of the crimes committed against a victim, she may withdraw some charges in order to reduce the length of the trial and save resources. Different concerns arise in each situation, and thus the standard for the admissibility of prosecutorial discretion differs.

In situation (a), both deterrence and victim's rights may be undercut, thus the test needs to be stringent: A prosecutor should only be permitted to offer leniency or immunity to a defendant if the benefits to the investigation outweigh the costs in terms of impunity and dissatisfaction of the individual interest of the victims. To determine the benefits, the prosecutor must consider the quantity and the quality of the information provided by the defendant—to what extent does it help to discover the truth—and the difficulty of obtaining that evidence by other means.[126] To determine the costs, the prosecutor must consider the degree to which deterrence is jeopardized, the seriousness of the offences committed by the defendant and his or her culpability, and the number of individuals victimized by the defendant. This test would foreclose, for instance, the reduction of punishment to a high-level official with chief responsibility in the execution of thousands of crimes, but would allow the grant of immunity to a low ranking official who acted as a guard in a detention camp, who could provide inside information about the detained victims and the individuals who committed acts of torture and murders.

125. Orentlicher, *Settling Accounts*, *supra* note 2, at 2598 (analyzing the theory and practice of the obligation to prosecute).

126. *Id.*

In situation (b), the test should be similar, but focused on the victim's rights that are at stake: The decision to not prosecute a defendant for the crimes committed against certain victims is permittable only if the benefits of the prosecution outweigh the sacrifice of the victim's rights. To determine the benefits, the prosecutor must evaluate the general availability of material resources, the backlogs in the system, the extent of resources saved by the decision, and the demands for those resources to investigate and prosecute other crimes. To determine the sacrifice of the victim's rights the prosecutor must consider the number of cases involved, the subjective interest of the victims in the prosecution of the defendant, and whether the victims have had their cases prosecuted against other defendants. Often, it will be unfeasible for the prosecution to charge a defendant with all of the crimes attributable to him.[127] Consider for example the case of the leader of a tyrannical regime responsible for the enforced disappearances of tens of thousands of individuals. In such a situation, it would be reasonable to prosecute the offender for a number of cases representative of the atrocities committed that are sufficient to obtain the maximum punishment. The selection of cases should be made following objective criteria, such as the availability of evidence, the seriousness of the crimes, and the geographical and temporal distribution of the cases. Equally important, when selecting the cases, prosecutors must avoid discrimination against a victim or groups of victims based on race, ethnicity, gender, religion, or political ideology.

Finally, in situation (c)—discretion in charging decisions involving the ame victim— the only concern is the deterrening effect of punishment. Here, prosecutors may exercise their discretionary power with greater amplitude: as long as the deterrent effect is ensured, the withdrawal of charges against a defendant is reasonable. According to this test, prosecutors may choose to charge only the most serious crimes and forego lesser ones.[128] But it would be unreasonable if a prosecutor decides, for example, to prosecute a defendant for abduction and withdraw charges of torture and murder.

127. *See* Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 520 (2003) (explaining the importance of weighing the logistical effects of case selection by the Prosecutor of the ICC).

128. *Id.*

However, the general prohibition of discrimination imposes an independent limit to this power. Prosecutors may not forego the prosecution of certain crimes when that decision, as applied, would result in the discrimination against certain victims.[129] For instance, a decision to not prosecute rape or other gender-based crimes that mostly affect women would be discriminatory against that collective, and therefore forbidden by international law.

2. Procedural Limits

International law poses two procedural limits on the exercise of prosecutorial discretion. First, victims must have a judicial recourse to ensure that their right to justice is not unreasonably limited by the decision to not prosecute their cases.[130] Second, the circumstances in which a prosecutor may exercise discretion and the criteria for doing so must be determined by law.[131]

These limits particularly apply in the Inter-American context, where a victim's right to justice has been expressly identified as part of the fundamental rights recognized in the American Convention on Human Rights.[132] According to article 25 of the Convention, everyone has the right to a judicial recourse "for protection against acts that violate his fundamental rights" and the States Parties undertake "to ensure that any person claiming such remedy shall have his rights determined by the competent authority."[133] Therefore, even if victims' individual rights to have offenders prosecuted and punished is not absolute and is subject to reasonable limitations, the holders of this right are entitled to a judicial recourse to ensure the decision to not prosecute does not unreasonably infringe on their right to justice. In other words, the victims aggrieved by the official

129. *Id.*

130. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, June 1, 2010, 213 U.N.T.S. 222 ("the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination.").

131. *See* Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162, 172 (2005) (stating the importance of established and public guidelines governing the system of judicial recourse).

132. However, as noted above, if this right is finally recognized by the Committee on Human Rights, this limit will apply universally.

133. American Convention, *supra* note 22, art. 25.

decision to forego prosecution of certain cases or defendants must have the opportunity to challenge that decision before a judge. If the judge finds that the prosecutor has exceeded his or her discretion, the decision to not prosecute should be overturned and the case must go forward.

In practice, this represents an important check on prosecutors' discretionary powers because they do not have the last word on whether a case must be prosecuted or not. Admittedly, this limitation impairs the effectiveness of prosecutorial discretion as a tool to control backlogs and to obtain inside evidence. Subjecting prosecutors' actions to judicial review increases the workloads on courts and may also discourage offenders from collaborating with the prosecution.[134] Nevertheless, its benefits are considerably superior. It is the only effective way to guarantee that prosecutorial discretion is applied within its strict limits, and that deterrence and victims' rights are not illegitimately restricted. Additionally, it requires prosecutors to remain accountable to victims and society about their decisions to not prosecute specific cases, which in turn reinforces their democratic legitimacy.[135]

The second procedural limit is the requirement that the circumstances and criteria for exercising prosecutorial discretion be established by law.[136] This is also a consequence of acknowledging that a decision not to prosecute certain cases implies a limitation to the victims' right to justice. Like any fundamental right, limitations to the right to justice are justified only if they are prescribed by law, pursue a legitimate end, and are necessary in a democratic society.[137]

134. Claudia Angermaier, *Essential Qualities of Prioritization Criteria: Clarity and Precision; Public Access; Non-Political and Confidence-Generating Formulations; Equal and Transparent Application; and Effective Enforcement*, *in* CRITERIA FOR PRIORITIZING AND SELECTING CORE INTERNATIONAL CRIMES CASES 201, 202 (Morten Bergsmo ed., 2d ed. 2010).

135. *Id.*

136. *Id.* at 204 (quoting the Recommendations of the Council of Europe on the Role of the Public Prosecution in the Criminal Justice System).

137. This general principle is established in article 29(2) of the Universal Declaration of Human Rights: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 29(2) (Dec. 10, 1948).

In the Inter-American context, the expression "law" has been interpreted as an act adopted by the legislative branch, in theunderstanding that this requirement is one of the most important guarantees against arbitrary restrictions to fundamental rights.[138] The underlying justification is that the legislative procedure "not only clothes [the acts limiting basic rights] with the assent of the people through its representative, but also allows minority groups to express their disagreement, propose different initiatives, participate in the shaping of the political will, or influence public opinion so as to prevent the majority from acting arbitrarily."[139]

A democratic debate of this kind is particularly desirable in relation to the way States should address human rights abuses. Although it is clear that States have the duty to investigate and prosecute these crimes, international law does not—and cannot—provide bright line rules about how this obligation must be discharged.[140] States have a margin of appreciation to adopt the measures that, in their particular situation, better satisfy the international obligation. The exercise of prosecutorial discretion is perhaps the clearest example of this. As explained above, international law only provides some guidelines to determine whether its use is valid in a particular case, but defers to State authorities the decision of when to use it. This decision involves complex policy and moral issues, on which reasonable persons may disagree. May prosecutors give up prosecution of any crime? May prosecutors grant immunity to any offender? These questions should be considered and decided in first place by the representatives of the people after a democratic deliberation, rather than by prosecutors. Regarding the specific circumstances, the Legislature may decide, for instance, that prosecutors should not forego prosecution of certain types of crimes or that certain classes of offenders should not benefit from grants of immunity.

Admittedly, legislative regulations further limit prosecutorial

138. The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86, Inter-Am. Ct. H.R. (ser. A) No. 6, ¶ 22 (May 9, 1986).

139. *Id.*

140. Orentlicher, *Settling Accounts*, *supra* note 2, at 2551 (stating "international human rights law traditionally has allowed governments substantial discretion to determine the means they will use to ensure protected rights.").

discretion's benefits. Certainly, prosecutors are technically more qualified to determine when desisting from prosecution in a particular case will favor the investigation and prosecution of other crimes. A statutory prohibition to exercise discretion in such case may represent an obstacle for the pursuing of that goal. Nevertheless, whatever cost that legislative regulation may have in terms of efficiency is amply paid back by the democratic legitimacy that it provides to prosecutorial discretion in the permitted cases.

V. CONCLUSION

The international obligation to investigate and prosecute serious human rights violations is in tension with the capacity of domestic judicial system to process extraordinary amounts of cases. As the case of Argentina shows, when a domestic system is required to investigate and prosecute all of the crimes committed in a context of massive violations of human rights, the outcome may be that more cases remain unsolved and a larger number of offenders goes unpunished. Indeed, if the system is unable to control the workloads, it may rapidly become overwhelmed by the number of cases and find itself incapable of carrying all of the investigations in an efficient manner. The more time it takes to solve the cases and prosecute those responsible, the more difficult it becomes to bring them to justice. Material evidence may be lost, witness may become unavailable, memories may fade, and defendants may flee or die. Moreover, if prosecutors are deprived of the power to grant immunity to obtain insider testimony, it is possible that many cases will be never solved or prosecutors will find ways to engage in this practice at the margin of the law.

This practical experience suggests that the international obligation to investigate and prosecute should not be interpreted as prohibiting the exercise of prosecutorial discretion. A better approach is to conclude that international law allows States to exercise prosecutorial discretion in order to overcome structural obstacles in the investigation and prosecution of serious human rights offenses. This power may be used to control workloads by foregoing prosecution of certain cases and to obtain evidence by granting immunity or leniency to defendants who cooperate with the prosecution.

However, international law also poses substantive and procedural limits to this practice. Prosecutorial discretion may be used only as a tool to advance in the discharge of the international obligation to investigate and prosecute, and never as a mechanism to circumvent that responsibility. Moreover, victims aggrieved by a decision to not prosecute a case should have the opportunity to challenge that decision before a judge and States should determine by law the criteria and circumstances in which prosecutorial discretion may be applied. When applied within these limits, prosecutorial discretion contributes to the deterrence of further abuses of human rights and guarantees victims' rights to justice, which are the main rationales of the international obligation to investigate and prosecute serious human rights violations.

This article is intended to start a new discussion on the transitional justice field. While classic scholarly works on transitional justice focused on which responses emerging democratic governments should undertake regarding past abuses, this article addresses the practical difficulties that States face when they actually try to investigate and prosecute massive crimes, the use of prosecutorial discretion as a tool to deal with those difficulties, and the regulation of this practice under international law. This analysis may be of use to those nations determined to seek truth and justice.